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No. 06-593

IN THE

Supreme Court of the United States

LONG ISLAND CARE AT HOME, LTD. AND MARYANN OSBORNE,

Petitioners,

v.

EVELYN COKE,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR PETITIONERS

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QUESTIONS PRESENTED

1. Whether the Second Circuit erred in refusing to give deference under *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984), to a thirty-year-old Department of Labor regulation—a regulation that has twice been upheld by the Tenth Circuit—on the ground that, even though it was promulgated under express grants of legislative authority and after full notice-and-comment rulemaking, the regulation was contained in a subpart headed "Interpretations."

2. Whether, in holding that a longstanding Department of Labor regulation was not persuasive and thus undeserving of any deference under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), the Second Circuit erred by failing to address the governing provisions of the Fair Labor Standards Act and by declining to give any weight to the Department's interpretation of its own regulations.

RULE 29.6 STATEMENT

Petitioner Long Island Care at Home, Ltd. has no parent company, and there are no publicly held companies that hold any stock of Long Island Care at Home, Ltd.

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BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals on remand (Pet. App. 1a-6a) is reported at 462 F.3d 48. The initial opinion of the court of appeals (Pet. App. 7a-32a) is reported at 376 F.3d 118. The opinion of the United States District Court for the Eastern District of New York (Pet. App. 33a-48a) is reported at 267 F. Supp. 2d 332.

JURISDICTION

The judgment of the court of appeals on remand was entered on August 31, 2006. The petition for a writ of certiorari was filed on October 26, 2006, and was granted on January 5, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS

The relevant provisions of the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.*, and the relevant regulations of the Department of Labor promulgated thereunder, are set forth at Pet. App. 65a-83a.

STATEMENT

This case involves a challenge to the validity of 29 C.F.R. § 552.109(a)—a regulation promulgated by the Department of Labor in 1975 after full notice-and-comment rulemaking—which declares that workers providing companionship services to the elderly and infirm are exempt from the minimum wage and overtime provisions of the Fair Labor Standards Act, *see* 29 U.S.C. § 213(a)(15) (providing exemption), even if they are employed by third parties rather than by the homeowner receiving care. Granting deference to the Department under the principles of *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984), the district court upheld the regulation. Pet. App. 33a-48a. The Second Circuit reversed, refusing to accord deference to the Department under either *Chevron* or *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). Pet. App. 7a-32a. After this Court vacated that decision, and remanded the case for consideration of further guidance provided by the Department, the Second Circuit adhered to its prior ruling and again held Section 552.109(a) to be unenforceable. Pet. App. 1a-6a.

A. The Statutory and Regulatory Framework

The issues in this case arise under certain provisions of the 1974 Amendments to the Fair Labor Standards Act (the "Act"). *See* Pub. L. 93-259, 88 Stat. 55. Prior to the Amendments, workers were typically entitled to receive a specified minimum wage and enhanced pay for overtime only if they were employed by an "enterprise engaged in commerce or in the production of goods for commerce." *See* 29 U.S.C. §§ 206(a), 207(a). *See generally National League of Cities v.*

Usery, 426 U.S. 833, 837-38 (1976); *Tony and Susan Alamo Foundation v. Secretary of Labor,* 471 U.S. 290, 295 n.8 (1985). At that time, the Act defined such an enterprise as an enterprise that, among other things, had annual gross sales of at least $250,000. *See* 29 U.S.C. § 203(s)(1) (1976). The annual limit has since been doubled to $500,000. *See* 29 U.S.C. § 203(s)(1)(A)(ii).

In 1974 Congress amended the Act to provide coverage for a particular class of workers: "Employees in domestic service." *See* 29 U.S.C. §§ 206(f), 207(*l*). Unlike most earlier provisions of the Act, the new Amendments defined the scope of coverage for domestic service workers primarily on the basis of the type of job that they performed. Thus, Section 206(f) required payment of a minimum wage to "[a]ny employee—(1) who in any workweek is employed in domestic service in a household [if the employee's compensation constituted wages under Title II of the Social Security Act] or (2) who in any workweek—(A) is employed in domestic service in one or more households, and (B) is so employed for more than 8 hours in the aggregate . . . ." 29 U.S.C. § 206(f). Similarly, Section 207(*l*) mandated enhanced overtime pay for "any employee in domestic service in one or more households [who is employed] for a workweek longer than forty hours . . . ." 29 U.S.C. § 207(*l*). *See also* H.R. Rep. No. 93-913, 93rd Cong., 2d Sess. 36 (1974) ("[i]t is the intent of the committee to include within the coverage of the Act all employees whose vocation is domestic service").

Congress provided exemptions from coverage, however, for domestic service workers performing two specified jobs: casual babysitting and companionship for the elderly and infirm. Section 213(a)(15) of the Act stated that the minimum wage and overtime provisions would not apply to "any employee employed on a casual basis in domestic service employment to provide babysitting services or any employee employed in domestic service employment to provide com-

panionship services for individuals who (because of age or infirmity) are unable to care for themselves (as such terms are defined and delimited by regulations of the Secretary)." 29 U.S.C. § 213(a)(15). The Act thus gave to the Department, in express terms, the authority to promulgate rules to define and delimit the exemptions provided by Section 213(a)(15). In addition, Congress conferred a general grant of rulemaking authority in the 1974 Amendments, stating that "the Secretary is authorized to prescribe necessary rules, regulations, and orders with respect to the amendments made by this Act." 1974 Amendments, § 29(b), 88 Stat. 76.

Pursuant to both of these express delegations of authority, *see* 40 Fed. Reg. 7405 (1975), the Department initiated a notice-and-comment rulemaking, which resulted in regulations subsequently published in the Code of Federal Regulations. *See* 29 C.F.R. §§ 516.34, 552.1-552.7, 552.101-552.110. The critical regulation for present purposes is Section 552.109(a), contained in Subpart B (headed "Interpretations"), which declares that "[e]mployees who are engaged in providing companionship services, as defined in § 552.6, and who are employed by an employer or agency other than the family or household using their services, are exempt from the Act's minimum wage and overtime pay requirements by virtue of section 13(a)(15)." 40 Fed. Reg. 7407. Although the original proposed regulation had not exempted workers providing companionship services "if the third party employer is a covered enterprise," 39 Fed. Reg. 35,385 (1974)—based on the premise that the Amendments did not intend to exempt "previously covered domestic service employees" (*id.*)—the Department altered its course upon further consideration. Explaining the change, the Department noted that the language of the exemption in the Act did not exclude third party employees but applied "to 'any employee' engaged 'in' the enumerated services." 40 Fed. Reg. 7405. The Department concluded that the final regula-

tion was "more consistent with the statutory language and prior practices concerning similarly worded exemptions." *Id.*

At the same time that the Department promulgated Section 552.109(a), it promulgated another regulation, 29 C.F.R. § 552.3, which purported to define the term "domestic service employment." That regulation, contained in Subpart A (entitled "General Regulations"), states that "[a]s used in section 13(a)(15) of the Act, the term 'domestic service employment' refers to services of a household nature performed by an employee in or about a private home (permanent or temporary) of the person by whom he or she is employed." The regulation then goes on to provide an "illustrative and not exhaustive" list of the kinds of work considered to be "domestic service employment." 40 Fed. Reg. 7405. As explained in the regulation, that work includes services by employees such as "cooks, waiters, butlers, valets, maids, housekeepers, governesses, nurses, janitors, laundresses, caretakers, handymen, gardeners, footmen, grooms, and chauffeurs of automobiles for family use." *Id.*

Section 552.109(a) has remained in force for more than 30 years. The Department has periodically proposed eliminating the exemption for employees of third party employers, *see* 58 Fed. Reg. 69,310, 69,312 (1993); 60 Fed. Reg. 46,798 (1995); 66 Fed. Reg. 5485, 5488 (2001), but, following various periods of comment, has invariably chosen not to do so. The most recent of these efforts took place six years ago when the Department, positing "an internal inconsistency" between Section 552.109(a) and Section 552.3, sought to resolve it by limiting the exemption to companions employed by the person receiving care or their families. *See* 66 Fed. Reg. 5485-86. The Department ultimately withdrew the proposed change, however, after numerous commenters stressed the severe economic impact that would result. *See* 67 Fed. Reg. 16,668 (2002).

B. This Litigation

1. Respondent, a worker employed by petitioner Long Island Care at Home, Ltd. to provide companionship services, brought this "test case" (Pet. App. 9a) challenging the application of Section 552.109(a) to workers employed by persons or entities other than the homeowners receiving care.[1] Finding that the regulation was entitled to "strong deference" under *Chevron,* 467 U.S. at 844, *see* Pet. App. 46a, and pointing to the "explicit grant of authority to the [Department of Labor] to define and delimit Section 213(a)(15)," as well as "the fact that these regulations have been in effect for over twenty-eight years," Pet. App. 46a, the district court held that Section 552.109(a) was a legitimate exercise of the Department's authority. *See* Pet. App. 46a.

The Second Circuit reversed. Proceeding on the basis that "[b]ecause the [Fair Labor Standards Act] is a remedial act, its exemptions are to be narrowly construed," Pet. App. 10a, the court refused to accord *Chevron* deference to Section 552.109(a), deeming it "an interpretive rather than a legislative regulation." Pet. App. 26a. Although the court of appeals acknowledged that "the rule 'grants rights, imposes obligations, or produces other significant effects on private interests,' as legislative regulations do," Pet. App. 26a (quoting *White v. Shalala,* 7 F.3d 296, 303 (2d Cir. 1993)), it held that the regulation did not merit *Chevron* deference under the test set out in *United States v. Mead Corp.,* 533 U.S. 218, 226-27 (2001), because the Department "did not intend to use the legislative power delegated in [29 U.S.C.] § 213(a)(15) when it promulgated § 552.109(a)." Pet. App.

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[1] Respondent also challenged the validity of 29 C.F.R. § 552.6, which defines the term "companionship services." The Second Circuit upheld Section 552.6, *see* Pet. App. 15a-22a, and it is not at issue before this Court.

26a.[2] It found that lack of intention to be "most apparent from its inclusion of the regulation under 'Subpart B-Interpretations' as opposed to 'Subpart A-General Regulations.'" Pet. App. 26a.[3] It thus concluded that "§ 552.109(a) does not qualify for *Chevron* deference because, by the DOL's own account, it was self-consciously not promulgated in exercise of Congress's delegated authority pursuant to § 213(a)(15)." Pet. App. 26a.

The Second Circuit then went on to reject the argument that Section 552.109(a) warranted deference under *Chevron* because it had been "promulgated after notice and comment . . . ." Pet. App. 27a. Although the court recognized that "*Mead* explicitly instructs us to consider whether a rule was the product of notice and comment in assessing whether to accord it *Chevron* deference," Pet. App. 27a (citing *Mead*, 533 U.S. at 230-31), it found no need to do so for a regulation that it had already classified as an "interpretive rule." Based on that characterization of Section 552.109(a), the Second Circuit dismissed the importance of the notice-and-comment procedure by saying that "the agency undertook a notice and comment procedure for an interpretive regulation despite the fact that the procedure was not required." Pet. App. 27a.[4]

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[2] The Court in *Mead* held that "administrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority." 533 U.S. at 226-27.

[3] The Second Circuit found additional support in the Secretary's statement that "[t]he definitions required by section 213(a)(15) are contained in §§ 552.3, 552.4, 552.5 and 552.6." 29 C.F.R. § 552.2(c); *see* Pet. App. 26a.

[4] The Second Circuit recognized that the Tenth Circuit, affording *Chevron* deference, had upheld the validity of Section 552.109(a). *See* Pet. App. 25a (citing *Johnston v. Volunteers of America, Inc.*, 213 F.3d 559,

The Second Circuit also declined to give deference to Section 552.109(a) under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). Addressing "Congressional purpose," the court, without reviewing any statutory language, took the view that "persons who were employed by a third party were outside the category of 'domestic service employees' and were protected by the [Act] before the 1974 amendments," Pet. App. 29a (citations omitted), and that "[i]t is implausible, to say the least, that Congress, in wishing to expand FLSA coverage, would have wanted the DOL to eliminate coverage for employees of third party employers who had previously been covered." Pet. App. 30a. The court of appeals also placed considerable weight on what it regarded as a "stark internal inconsistency" between Section 552.3 (the regulation defining "domestic service employment") and Section 552.109(a), Pet. App. 30a, finding that "[p]lainly, under § 552.3, employees employed by third parties do not qualify for the exemption" that Section 552.109(a) grants to them. Pet. App. 30a. Finally, the court pointed to the fact that the Department had proposed eliminating the exemption for third party employees on several occasions, deeming its position "hardly . . . a model of consistency," Pet. App. 30a, and questioned both the Department's reasoning and procedural regularity in adopting Section 552.109(a) in the first place. *See* Pet. App. 30a-31a.

2. Petitioners filed a petition for certiorari. *See* Petition for A Writ of Certiorari, No. 04-1315. Submitting a brief by invitation, the United States stated, among other things, that "it would be appropriate for this Court to grant the petition for a writ of certiorari to review the [failure to extend deference to Section 552.109(a)]." U.S. Br., No. 04-1315, at 9. However, noting that the Department of Labor had recently offered "authoritative agency guidance" making

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562 (2000)). Saying that *Johnston* had been decided before *Mead*, the Second Circuit declined to follow it. *See* Pet. App. 25a.

clear that it intended "Section 552.109(a) to be an exercise of its expressly delegated legislative authority," *id.* (citing Wage and Hour Advisory Memorandum No. 2005-1), the Solicitor General recommended that the Court vacate the judgment and remand the case to the Second Circuit for consideration of the Department's position. *See* U.S. Br. at 9-10.[5] The Court then granted the petition, vacated the judgment, and remanded the case "for further consideration in light of the Department of Labor's Wage and Hour Advisory Memorandum No. 2005-1 (December 1, 2005)." 126 S. Ct. 1189 (2006).

On remand, the Second Circuit adhered to its original rulings. With respect to *Chevron* deference, it again concluded, "for substantially the same reasons," that "§ 552.109(a) was not intended, at the time of its promulgation, to be a legislative rule; rather, it was meant to be an interpretive rule." Pet. App. 3a. Finding "arguments to the contrary presented in the DOL Memo" to be "not persuasive," Pet. App. 3a, it said that, even if the Department regarded Section 552.109(a) as "legally binding," Pet. App. 3a, the regulation "could have been simply intended to provide guidance to DOL employees as to how the agency planned to interpret 'domestic service employment' in the third-party employer context." Pet. App. 4a. The court of appeals also declined, once again, to give *Skidmore* deference to the regulation. While it backed away from its earlier view that Section 552.109(a) was inconsistent with congressional intent, Pet. App. 5a, it continued to rely on the purported incompatibility between Section 552.109(a) and Section 552.3, despite the Department's explanation of why the two provisions could be read harmoniously, saying that it "need not defer to an agency's interpretations of its own regulations when those regulations, like § 552.109(a) and §552.3, are unambiguous." Pet. App. 5a (citing *Christensen v.*

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[5] The Advisory Memorandum, reprinted at Pet. App. 50a-64a, also set forth guidance regarding the proper reading of Section 552.3. *See* Pet. App. 54a-63a.

Harris County, 529 U.S. 576, 588 (2000)). It thus declared Section 552.109(a) unenforceable. Pet. App. 6a.[6]

SUMMARY OF ARGUMENT

The Second Circuit has twice struck down a Department of Labor regulation that exempts third party employees providing "companionship services" from the wage and hour provisions of the Fair Labor Standards Act. *See* 29 C.F.R. § 552.109(a); 29 U.S.C. § 213(a)(15) (granting "companionship services" exemption). Although the Department promulgated the regulation pursuant to two explicit grants of rulemaking authority and after notice-and-comment rulemaking, the Second Circuit held, *first*, that the regulation was not entitled to deference under *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984), and, *second*, that it was not "persuasive." Both rulings are incorrect.

I

The Court has held that administrative agencies charged with implementing a federal statute have authority to "mak[e] rules to fill any gap left, implicitly or explicitly, by Congress." *Chevron*, 467 U.S. at 843 (internal quotation marks omitted). Thus, when Congress has delegated rulemaking authority to an agency, a federal court must recognize that Congress intended any statutory ambiguity to be "resolved, first and foremost, by the agency," *Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735, 741 (1996), and it may not "substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of [the] agency." *Chevron*, 467 U.S. at 844. Not all agency actions, however, merit this familiar *Chevron* deference. *See, e.g.*,

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[6] As it had done after its initial decision, the Second Circuit stayed the mandate pending the filing of a Petition for a Writ of Certiorari in this Court. *See* Pet. App. 49a. That stay remains in effect.

Christensen v. Harris County, 529 U.S. 576, 587 (2000). To distinguish those that do from those that do not, this Court has set forth a two-part test, declaring that "administrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority." *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001).

There is no real dispute in this case that Congress delegated authority to the Department to make regulations "carrying the force of law." In establishing an exemption for workers that provide "companionship services," 29 U.S.C. § 213(a)(15), Congress expressly declared that the terms of the exemption provision should be "defined and delimited by regulations of the Secretary," *id.*, a delegation that conveys "broad authority." *Auer v. Robbins*, 519 U.S. 452, 456 (1997). In addition, Congress set forth a general grant of rulemaking power, saying that "the Secretary of Labor is authorized to prescribe necessary rules, regulations, and orders with respect to amendments made by this Act." 1974 Amendments, § 29(b), 88 Stat. 76 (1974). This Court has frequently recognized that regulations promulgated under similar grants should receive *Chevron* deference. *See, e.g., Barnhart v. Walton*, 535 U.S. 212, 217 (2002).

Although the Second Circuit agreed that Congress had given the Department lawmaking authority, Pet. App. 26a, it concluded that the Department had not used it in promulgating the third party employer regulation. *Id.* But the rulemaking history demonstrates just the opposite. Most notably, the Department promulgated the third party employer regulation after full notice-and-comment rulemaking, a procedure that is required only for rules of a legislative nature. *See* 5 U.S.C. § 553(b)(A); *see also Mead*, 533 U.S. at 230 ("the overwhelming number of our cases applying *Chevron* defer-

ence have reviewed the fruits of notice-and-comment rulemaking or formal adjudication"). Furthermore, the Department expressly invoked its delegated lawmaking authority under both statutory grants, and it set out its rule in binding terms that have the look and feel of "law." Finally, it has recently affirmed, in a 2005 Advisory Memorandum, that it intended the regulation to be binding at the time of promulgation and has always treated it that way. Taken together, these Department actions are more than enough to establish lawmaking intent.

The Second Circuit's holding to the contrary largely rested upon its belief that, because the regulation was set forth in a subpart headed "Interpretations," it was not entitled to *Chevron* deference. But this Court has given *Chevron* deference to a Department regulation with an identical heading, *see Auer*, 519 U.S. at 452, and, in any event, it has frequently declared that "interpretations" may receive *Chevron* deference. *See, e.g., Mead*, 533 U.S. at 227; *Gonzales v. Oregon*, 126 S. Ct. 904, 914 (2006). And the Second Circuit's other reason for withholding *Chevron* deference—its belief that the Department had exercised its specific Section 213(a)(15) "define and delimit" power with respect to other regulations but not Section 552.109(a)—is not just unpersuasive on its own terms, but ignores the fact that the Department also invoked the alternate, more general grant of lawmaking power in Section 29(b) of the Amendments, which is sufficient in and of itself to support the third party employer regulation. The regulation thus merits *Chevron* deference.

II

To apply *Chevron*, a court must determine "whether the statute unambiguously forbids the [a]gency's interpretation, and, if not, whether the interpretation, for other reasons, exceeds the bounds of the permissible." *Barnhart*, 535 U.S. at 218. Here, respondent seeks to narrow the exemption for domestic workers providing companionship services by nar-

rowing the scope of coverage for domestic workers generally, arguing that the term "employed in domestic service"—which is used in both the coverage provisions and the exemption (*see* 29 U.S.C. §§ 206(f), 207(*l*), 213(a)(15))—extends only to workers employed by the homeowner. But there is nothing in the 1974 Amendments to require that reading, and much to cast doubt on it. The terms of the coverage provisions are broadly written, *see* 29 U.S.C. § 206(f) (minimum wage); § 207(*l*) (overtime), and neither provision expressly limits coverage only to employees directly employed by the homeowner. Likewise, the terms of the "companionship services" exemption are broad ("any employee employed in domestic service"), *see* 29 U.S.C. § 213(a)(15), and make no reference to the nature of the employer.

Respondent argues that the phrase "employed in domestic service" must be interpreted to mean "employed in a household *by the household*." Br. in Opp. 21 (emphasis added). But the text of the statute points the other way. Section 213(a)(15) itself does not suggest any limiting definition, and Section 206(f), the minimum wage provision covering "[E]mployees in domestic service," speaks of workers "employed in domestic service *in a household*," not of workers employed "by the household." 29 U.S.C. § 206(f). Section 207(*l*), the overtime provision, likewise refers only to employment "in" a household. 29 U.S.C. § 207(*l*).

Respondent's efforts to rely on legislative history also fall short. Although several Senate and House Reports describe the "generally accepted meaning" of "domestic service" as referring to work "in or about a private home of the person by whom [the worker] is employed," *see, e.g.*, S. Rep. 93-690, 93rd Cong., 2d Sess. 20 (1974), those references do not reveal a plain, or even likely, intent to limit the 1974 Amendments to homeowner-employed workers. To begin with, the same Senate and House Reports treat the term "domestic service

employees" as essentially synonymous with the term "private household workers," *see id.* at 19—a term that indisputably includes employees of third parties—indicating that members of Congress using the terms were thinking about the place of work ("a private home"), not about the employer. Moreover, the reading offered by respondent would completely exclude from the Act's minimum wage and overtime provisions any employee who did not work either for the homeowner or for a business large enough to qualify as an "enterprise," *see* 29 U.S.C. §§ 206(a)(1), 207(a)(1), leaving outside those provisions all domestic workers employed by small agencies or by family members living under a different roof. Such omissions would be inconsistent with the understanding, reflected in the legislative history, that the 1974 Amendments were generally meant "to include within the coverage of the Act all employees whose vocation is domestic service." S. Rep. No. 93-690, at 20.

In striking down the third party employer regulation, the Second Circuit concluded that it was in irreconcilable conflict with another Department regulation, *see* 29 C.F.R. § 552.3, that, in the court of appeals' view, required the homeowner to be the domestic worker's employer. The Department has explained why this is not so, however, and the Second Circuit should have given deference to the Department's reading of its own regulations. *See, e.g., Stinson v. United States*, 508 U.S. 36, 45 (1993). That obligation cannot be put aside here by asserting that the regulations are "unambiguous," *see Christensen*, 529 U.S. at 588, because the very existence of a "conflict" between two regulations—at least, as the Second Circuit has chosen to read them—indicates that some kind of ambiguity exists. The Department has provided a reasonable way of resolving it, and its third party employer regulation should stand, whether or not *Chevron* deference is accorded to it.

III

The third party employer regulation has governed whether companions are entitled to minimum wages and overtime pay for more than 30 years. Although Congress has repealed many exemptions under the Fair Labor Standards Act, it has left Section 213(a)(15) undisturbed. Moreover, when the Department proposed eliminating the third party employer exemption several years ago, it withdrew the proposal, after notice and comment, because of a concern about potential adverse effects. Those potential effects remain today, and if contrary policy arguments have any basis, it is Congress and the Department that should address them.

ARGUMENT

I. THE THIRD PARTY EMPLOYER REGULATION MERITS REVIEW UNDER THE *CHEVRON* STANDARD

The Second Circuit, in holding Section 552.109(a) to be invalid, got off on the wrong foot by deciding that the regulation did not merit review under the deferential standard set forth in *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984). In *Chevron*, this Court observed that "'[t]he power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress.'" 467 U.S. at 843 (quoting *Morton v. Ruiz*, 415 U.S. 199, 231 (1974)). The Court thus declared that "[i]f Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation," 467 U.S. 843-44, and the "legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." 467 U.S. at 844. Moreover, even if the delegation is merely "implicit," the governing principle is that "a court may not

substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency." *Id.*

The Court has explained that this kind of judicial deference rests upon several distinct, though related, understandings. In *Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735 (1996), the Court stated that "[w]e accord deference to agencies under *Chevron* . . . because of a presumption that Congress, when it left an ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows." *Id.* at 740-41. *See also National Cable & Tel. Ass'n v. Brand X Internet Services*, 545 U.S. 967, 982 (2005) ("*Chevron's* premise is that it is for agencies, not courts, to fill statutory gaps"). The Court has also remarked that "judgments about the way the real world works . . . are precisely the kind that agencies are better equipped to make than courts," *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 651 (1990), adding that "practical agency expertise is one of the principal justifications behind *Chevron* deference." *Id.* at 651-52, citing *Chevron*, 467 U.S. at 865.

In recent years, the Court has indicated that some less formal agency actions may not be entitled to *Chevron* deference. *See Gonzales v. Oregon*, 126 S. Ct. 904, 916 (2006) ("*Chevron* deference . . . is not accorded merely because the statute is ambiguous and an administrative official is involved"). Thus, in *Christensen v. Harris County*, 529 U.S. 576 (2000), the Court declined to give *Chevron* deference to "an [agency] interpretation contained in an opinion letter, not one arrived at after, for example, a formal adjudication or notice-and-comment rulemaking." *Id.* at 587. The Court said that "[i]nterpretations such as those in opinion letters—like interpretations contained in policy statements, agency manu-

als, and enforcement guidelines, all of which lack the force of law—do not warrant *Chevron*-style deference." *Id.* The following Term, the Court denied *Chevron* deference to a tariff classification ruling of the United States Customs Service, *see United States v. Mead Corp.*, 533 U.S. 218 (2001), finding "no indication that Congress meant to delegate authority to Customs to issue classification rulings with the force of law," *id.* at 231-32, and no evidence that "Customs ever set out with a lawmaking pretense in mind when it undertook to make classifications like these." *Id.* at 233; *see id.* (pointing out that "Customs does not generally engage in notice-and-comment practice when issuing [the classifications]"). *See also Alaska Dept. of Environmental Conservation v. EPA*, 540 U.S. 461, 477-78 (2004) (no *Chevron* deference for an internal guidance memorandum).

The Court, however, has continued to extend *Chevron* deference to more formal agency actions. *See, e.g., Brand X*, 545 U.S. at 980-81; *Barnhart v. Walton*, 535 U.S. 212, 217-18 (2002). To distinguish regulations that deserve *Chevron* deference from those that do not, therefore, the Court has set forth a two-part test. For "administrative implementation of a particular statutory provision [to qualify] for *Chevron* deference," *Mead*, 533 U.S. at 226, it first must "appear[] that Congress delegated authority to the agency generally to make rules carrying the force of law . . . ." *Id.* at 226-27. If that condition is met, the Court said, then it must be shown that "the agency interpretation claiming deference was promulgated in the exercise of that authority." *Id.* at 227. In this case, the Second Circuit found that only the first half of that test had been satisfied: *i.e.*, that Congress had expressly delegated lawmaking authority to the Department but that the Department had not relied on it in promulgating the third party employer regulation, producing nothing more than an "interpretive rule" without the force of law. As we discuss below, while the Second Circuit was clearly right about the delegation of lawmaking power from Congress, it was

equally wrong in concluding that Section 552.109(a) lacks the force of law.

A. Congress Authorized the Department to Issue Regulations with The Force of Law

It seems beyond serious question that, insofar as the boundaries of the "companionship services" exemption are concerned, Congress wanted the Department to "'enjoy primary interpretational authority.'" *Mead*, 533 U.S. at 230 n.11 (quoting Merrill & Hickman, *Chevron's Domain*, 89 Geo. L. J. 833, 872 (2001)). To start with, although Congress need not "expressly delegate[] authority or responsibility to implement a particular provision or fill a particular gap," *Mead*, 533 U.S. at 229, it did so here in unmistakable terms: Section 213(a)(15) explicitly provides that the exemption extends to "any employee employed in domestic service employment to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves (as such terms are defined and delimited by regulations of the Secretary)." 29 U.S.C. § 213(a)(15). As this Court remarked about a comparable delegation in Section 213(a)(1) of the Fair Labor Standards Act, that kind of language conveys "broad authority to 'defin[e] and delimi[t]' the scope of the exemption . . . ." *Auer v. Robbins*, 519 U.S. 452, 456 (1997); *see also Steen v. United States*, 468 F.3d 1357, 1362-63 (Fed. Cir. 2006); *Wint v. Yeutter*, 902 F.2d 76, 81 (D.C. Cir. 1990) (Ginsburg, R.B.,J.). Indeed, even the Second Circuit below acknowledged "the legislative power delegated in § 213(a)(15)." Pet. App. 26a.

This specific grant of authority to the Department is then supplemented by a second explicit grant of rulemaking authority, albeit a more general one. Thus, Section 29 of the 1974 Amendments provides that "the Secretary of Labor is authorized to prescribe necessary rules, regulations, and orders with regard to the amendments made by this Act." 88 Stat. 76. Although this form of delegation is less precise than

a direction to define particular statutory terms, this Court has commonly held that regulations promulgated pursuant to similar grants are entitled to *Chevron* deference. *See, e.g., Brand X*, 545 U.S. at 980-81; *Household Credit Services, Inc. v. Pfennig*, 541 U.S. 232, 238 (2004); *Barnhart*, 535 U.S. at 217; *see also Gonzales*, 126 S. Ct. at 916 ("In many cases authority is clear because the statute gives an agency broad power to enforce all provisions of the statute"). As a result, this separate grant of authority—unmentioned by the Second Circuit—would be enough in and of itself to justify the promulgation of regulations with the force of law.

Finally, the structure and purposes of the Amendments further indicate that "Congress would expect the [Department of Labor] to be able to speak with the force of law when it addresses ambiguity in the statute or fills a space in the enacted law . . . ." *Mead*, 533 U.S. at 229. The operative phrases in Section 213(a)(15)—terms such as "employed in domestic service" and "companionship services"—have no fixed and certain meaning, and it is natural that Congress, having chosen not to define them in the Act, would want the Department, with its extensive experience in application of the wage and hour laws, to give them more concrete shape. Indeed, it is particularly appropriate for Congress to draw on that kind of agency experience here: in order to implement a specific exemption from otherwise applicable statutory provisions, it is obviously necessary to weigh both the broad interests underlying the general rule and the more particular interests giving rise to the exemption. That is precisely the kind of policy-based judgment that agencies are in the best position to make. *See Brand X*, 545 U.S. at 980 (noting "difficult policy choices that agencies are better equipped to make than courts").

B. The Department, In Promulgating The Third Party Employer Regulation, Exercised Its Delegated Lawmaking Authority

1. Although the Second Circuit mistakenly thought otherwise, Pet. App. 26a-27a, the rulemaking history demonstrates that the Department promulgated Section 552.109(a) "in the exercise of [its delegated lawmaking] authority." *Mead*, 533 U.S. at 227. The Department engaged in notice-and-comment rulemaking, specifically invoked both of its express grants of lawmaking authority, and issued a rule that is set forth in the direct mandatory terms of a law. For good measure, the Department also recently affirmed that it had intended Section 552.109(a) to be binding at the time of issuance and that it has subsequently treated it that way. *See* Pet. App. 50a-64a. Whether or not any of these lawmaking indicia is sufficient by itself, taken together they offer overwhelming evidence that the Department promulgated a regulation with the force of law.

We begin with the fact that the Department chose to engage in notice-and-comment rulemaking for all of the 1975 regulations, including Section 552.109(a). Speaking to the first part of the *Mead* test, this Court has emphasized the importance of notice-and-comment rulemaking, saying that "[i]t is fair to assume generally that Congress contemplates administrative action with the effect of law when it provides for a relatively formal administrative procedure tending to foster the fairness and deliberation that should underlie a pronouncement of such force." 533 U.S. at 230; *see also id.* at 229 (authorization of rulemaking is "a very good indicator of delegation meriting *Chevron* treatment"); *Yellow Transp., Inc. v. Michigan*, 537 U.S. 36, 45 (2002); *United States v. Haggar Apparel Co.*, 526 U.S. 380, 390 (1999). Given that assumption, it is also reasonable to assume that an agency's resort to that "relatively formal administrative procedure" will show that the agency indeed meant to make law. *See*

Brand X, 545 U.S. at 1015 (Scalia, J., dissenting); *but see id.* at 1004 (Breyer, J., concurring).[7] That inference follows logically from the fact that, under the Administrative Procedure Act, an agency is generally required to follow notice-and-comment procedures only for substantive (legislative) rules, not for "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice." 5 U.S.C. § 553(b)(A).

It is unsurprising, therefore, that numerous federal courts of appeals have pointed to the use of notice-and-comment rulemaking as a strong, even dispositive, indication that an agency is exercising its delegated lawmaking power. *See Whitaker v. Thompson*, 353 F.3d 947, 950 (D.C. Cir. 2004); *White v. Scibana*, 390 F.3d 997, 1000 (7th Cir. 2004); *Shotz v. City of Plantation, Fla.*, 344 F.3d 1161, 1179 (11th Cir. 2003); *Northwest Ecosystem Alliance v. United States Fish and Wildlife Service*, 2007 WL 286581 (9th Cir. 2007); *Perez-Olivo v. Chavez*, 394 F.3d 45, 53 n.6 (1st Cir. 2005); *Koyo Seiko Co., Ltd. v. United States*, 258 F.3d 1340, 1347 (Fed. Cir. 2001). In *Whitaker*, for example, the D.C. Circuit stated that "[b]ecause we are reviewing an agency's interpretation of the statute it is entrusted to administer, and the agency reached its interpretation after a relatively formal process with public notice and comment . . . , we review under the familiar framework established by *[Chevron]*." 353 F.3d at 950. Similarly, the Federal Circuit, reviewing an agency rule, noted that the methodology set forth in the rule "was adopted after notice-and-comment rulemaking, and thus is entitled to maximum deference." *Koyo Seiko*, 258 F.3d at 1347. The First Circuit rejected an argument that a Bureau of Prisons rule was entitled to nothing more than *Skidmore* deference, *see Skidmore v. Swift & Co.*, 323 U.S. 134 (1944);

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[7] The Court has made clear that notice-and-comment rulemaking is not *necessary* for a regulation to receive *Chevron* deference. *See Barnhart*, 535 U.S. at 221-22; *Mead*, 533 U.S. at 231.

note 11 *infra*, remarking that, because the interpretation was embodied in a regulation "which was adopted pursuant to the notice-and-comment procedure of the Administrative Procedure Act," *Perez-Olivo,* 394 F.3d at 53 n.6, it was "[t]hus . . . entitled to full deference under *Chevron*." *Id.* And, recently, the Ninth Circuit has held that the use of notice-and-comment rulemaking "weighs in favor of affording *Chevron* deference." *Northwest Ecosystem*, 2007 WL 286581, at 4.

The linkage between notice and comment, on the one hand, and substantive lawmaking, on the other, reflects the fact that such procedures promote the kind of "due deliberation" appropriate to binding agency action. *See Smiley*, 517 U.S. at 741; *see also NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 764 (1969) (plurality opinion) (requirement intended to "assure fairness and mature consideration of rules of general application"). The two-way nature of the process reflects Congress's "judgment that notions of fairness and informed administrative decisionmaking require that agency decisions be made only after affording interested persons notice and an opportunity to comment." *Chrysler Corp. v. Brown*, 441 U.S 281, 316 (1979). Unlike more informal forms of decisionmaking, therefore, the making of law through notice-and-comment procedures assures that agency judgments will be arrived at on the basis of a record developed after public participation, *see, e.g., Air Transport Ass'n of America v. Dept. of Transp.*, 900 F.2d 369, 375 (D.C. Cir. 1990), providing the foundation for the serious consideration that lawmaking should involve. *See Mead*, 533 U.S. at 230.

The Second Circuit dismissed the fact that the Department had promulgated the regulation after notice and comment, saying that "the agency undertook a notice and comment procedure for an interpretive regulation despite the fact that the procedure was not required," Pet. App. 27a, and adding that "following the notice and comment procedure, at most, buttresses a claim that the agency gave consideration to what

it did; it does not alter the fact that the agency did not act pursuant to legislative authority." *Id.* But that approach gets matters backwards. Rather than looking to the notice-and-comment procedure as an indication that the Department had invoked its lawmaking authority, the Second Circuit simply ignored it in deciding the critical issue—whether the regulation had the force of law or was merely "interpretive"—and then, once it finally turned to it, gave the procedure short shrift by treating it as unnecessary for what the court of appeals had already deemed an interpretive rule. This cart-before-the-horse analysis necessarily undervalues the legal force of a duly promulgated regulation because, contrary to what the Second Circuit seemed to believe, "following the notice-and-comment procedure" *does* indicate that an agency meant to "act pursuant to legislative authority." Pet. App. 27a. *See Haggar Apparel*, 526 U.S. at 390. It thus is an integral part of the inquiry into whether a rule has the force of law, not just an afterthought once the essential analysis has been completed.[8]

Although the Department's reliance on notice-and-comment rulemaking provides the most obvious evidence of its lawmaking intent, *see Mead*, 533 U.S. at 230 ("the overwhelming number of our cases applying *Chevron* deference have reviewed the fruits of notice-and-comment rulemaking or formal adjudication"), several other factors lead to the same conclusion. First, there is the fact that the Department specifically relied on both congressional grants of rulemaking authority—the specific grant in Section 213(a)(15) and the

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[8] A rule promulgated following notice and comment, of course, may fail the *first* part of the *Mead* test. *See, e.g., Motion Picture Ass'n of America, Inc. v. FCC*, 309 F.3d 796 (D.C. Cir. 2002). An agency cannot assert authority that Congress did not delegate just by engaging in notice-and-comment rulemaking. As we have discussed, *see* pages 18-19 *supra*, the Act unmistakably grants the Department the authority to promulgate legislative rules. *See* 29 U.S.C. § 213(a)(15); 1974 Amendments, § 29(b), 88 Stat. 76.

general grant in Section 29(b) of the Amendments—in explaining its authority to promulgate the regulations. Thus, after setting forth the Table of Contents for the new regulations, which included Section 552.109(a) within Subpart B, the Department stated its authority as follows: "AUTHORITY: Section 13(a)(15) of the Fair Labor Standards Act, as amended (29 U.S.C. 213(a)(15), 88 Stat. 62; Sec. 29(b) of the Fair Labor Standards Amendments of 1974 (Pub. L. 93-259, 88 Stat. 76)." 40 Fed. Reg. 7405. The natural assumption is that, having invoked these lawmaking powers, the Department meant to employ them.

Second, the character of the rule itself supports the idea that it is law, not merely an advisory opinion about what the law is or an agency statement about its policy of enforcement. Notably, it is written in terms of a law: Section 552.109(a) says unequivocally that third party employees "*are exempt* from the Act's minimum wage and overtime pay requirements by virtue of section 13(a)(15)." 29 U.S.C. § 552.109(a) (emphasis added). The regulation thus does not set forth a tentative or conditional position, or an interpretation that allows for further adjustment as a matter of agency discretion. Nor does it, as the Second Circuit hypothesized, read as though it were merely "guidance to DOL employees as to how the agency planned to interpret 'domestic service employment' in the third-party employer context." Pet. App. 4a; *see generally Northwest Ecosystem*, 2007 WL 286581, at 5 (noting absence of "evidence that [the agency regulation] has ever been treated . . . as anything other than legally binding"). To the contrary, the regulation fixes private rights and duties, *see Chrysler*, 441 U.S. at 302, as legislative rules do. By its express terms, third party employers are not required to pay, and companions employed by third parties have no right to demand, the wages and overtime pay called for under Sections 206 and 207 of the Act.

The Department's intention to bind itself and others is reflected not just in the language of the regulation, but in its subsequent treatment by the agency. For more than 30 years, Section 552.109(a) has been the governing law with respect to the rights and obligations of the workers and employers subject to its terms. And, while the Department has periodically questioned whether it should revise the rule, it has never just decided to make a change unilaterally, as it might do, say, for a matter of "guidance to DOL employees." Pet. App. 4a. Rather, it has always subjected the proposed changes to notice-and-comment rulemaking. *See* 58 Fed. Reg. 69,310, 69,312 (1993); 60 Fed. Reg. 46,798 (1995); 66 Fed. Reg. 5485, 5488 (2001). The decision to pursue that more formal approach offers further evidence that Section 552.109(a), from the beginning, was understood to carry the force of law.

Lastly, we have a recent declaration by the Department itself that, in promulgating Section 552.109(a), it intended to, and did, exercise its lawmaking power. *See* Pet. App. 50a-64a. The December 2005 Advisory Memorandum—issued after the initial Second Circuit decision in this case and directly contradicting it—stated in plain terms that "the Department considers the third party employment regulations at 29 C.F.R. § 552.109 to be authoritative and legally binding." Pet. App. 63a. To support that representation, the Department pointed to specific language in the 1975 Final Notice ("these exemptions *can be available* to such third party employers") demonstrating that "at the time the final rule was promulgated, the Department believed that the availability of the companionship exemption to third party employers turned decisively on its pronouncement in the regulations—something that could be true only of a legislative rule." Pet. App. 63a-64a. It thus reiterated that "the Department has always treated the third party employment regulations as legally binding legislative rules . . . ." Pet. App. 64a.

The Second Circuit should have given these views more careful consideration than it did. *See* Pet. App. 3a-4a. Although an agency's characterization of its own actions is not conclusive, *see, e.g., Columbia Broadcasting System, Inc. v. United States,* 316 U.S. 407, 416 (1942), various federal courts of appeals have held that agency characterizations carry at least some force, even in the typical situation where the agency is contending that its challenged action is not a legislative rule subject to notice-and-comment rulemaking. *See, e.g., American Airlines, Inc. v. Dept. of Transp.*, 202 F.3d 788, 797 (5th Cir. 2000) ("significant deference to an agency's characterization of its own action"); *Splane v. West,* 216 F.3d 1058, 1063 (Fed. Cir. 2000) ("a factor [to] consider") (internal quotation marks omitted); *General Motors Corp. v. Ruckelshaus*, 742 F.2d 1561, 1565 (D.C. Cir. 1984) (en banc) ("relevant," though not "dispositive"); *see also Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 517 (1994) ("Secretary was well within her discretion to interpret this language [in a regulation] as imposing a substantive limitation . . . ."). In our view, the characterization should be entitled to considerably greater weight when, as here, the agency has actually undertaken the process of notice-and-comment rulemaking and is asking only to have its rule treated with the deference that rules promulgated after notice and comment usually get. In that situation, unlike the more common case, extending judicial deference to an agency's view of its own actions poses no risk that the agency will be evading important procedural requirements. Furthermore, the Department's characterization here is supported by the historical evidence, *see* pages 20-25 *supra*, and it accords with the agency's application of the regulation over a long period of time. *See generally Barnhart,* 535 U.S. at 220 ("this Court will normally accord particular deference to an agency interpretation of 'longstanding' duration"). There was no good reason for the Second Circuit to treat it so dismissively.

2. All this evidence of lawmaking notwithstanding, the Second Circuit held that the Department, in promulgating Section 552.109(a), had not intended to make any law. The first ground for this holding—which was, in turn, the basis for denying *Chevron* deference—was that the Department had put the regulation "under 'Subpart B-Interpretations' as opposed to 'Subpart A-General Regulations.'" Pet. App. 26a. The court of appeals thus concluded that the Department had failed to satisfy the second part of the *Mead* standard "because, by the DOL's own account, [the regulation] was self-consciously not promulgated in exercise of Congress's delegated authority pursuant to § 213(a)(15)." Pet. App. 26a.

The basic problem with this analysis lies in a critical underlying assumption: that an agency "interpretation" is not, and cannot be, a rule with the force of law. That is simply incorrect. Numerous regulations with the force of law "interpret" the governing statute in the sense that they supply legal content to statutory provisions that require further detail. *See Chevron,* 467 U.S. at 844 (discussing agency authority "to elucidate a specific provision of the statute by regulation"); *Central Texas Telephone Co-Op, Inc. v. FCC*, 402 F.3d 205, 212 (D.C. Cir. 2005) ("[t]he APA's definition of 'rule' contemplates that all types of rules, legislative and interpretive alike, may interpret 'law'"). Indeed, the Court in *Mead* acknowledged that agency interpretations can have the force of law, expressly declaring that *Chevron* deference is warranted when "the agency *interpretation* claiming deference was promulgated in the exercise of [delegated lawmaking] authority." *Mead,* 533 U.S. at 227 (emphasis added); *see also Gonzales,* 126 S. Ct. at 914 ("[A]n interpretation of an ambiguous statute may also receive substantial deference") (citing *Chevron*); *Christensen*, 529 U.S. at 587 (*Chevron* deference available for "an agency's regulation containing a reasonable interpretation of an ambiguous statute"). The question, therefore, is not whether an agency regulation "interprets" a statute, but whether the interpretation is one

"carrying the force of law." *Mead*, 533 U.S. at 227. Although the task of distinguishing between the different forms of interpretation is not unproblematic, *see Lincoln v. Vigil*, 508 U.S. 182, 196 (1993); *American Hospital Ass'n v. Bowen*, 834 F.2d 1037, 1046 (D.C. Cir. 1987), it seems as clear as possible that a regulation invoking delegated law-making authority, resulting from the process of notice and comment, and fixing rights and obligations in concrete, non-precatory terms falls somewhere on the "lawmaking" side of the interpretive line.[9]

Seeking to bolster the contrary view, respondent argues that various courts of appeals have given only lesser *Skidmore* deference to Department of Labor "interpretations." Br. in Opp. 15 (citing cases). But it is a mistake to treat all Department of Labor interpretations as alike. For example, in the process of implementing the Fair Labor Standards Act's exemption for "bona fide executive, administrative, or professional" employees, 29 U.S.C. § 213(a)(1), the Department long ago issued a broad range of what it called "interpretations" *without* going through the notice-and-comment process. *See* 14 Fed. Reg. 7730 (1949). That kind of less formal agency guidance would commonly receive no more than *Skidmore* deference, as the cases cited by respondent demonstrate. However, where the Department has actually engaged in notice-and-comment rulemaking—as it did here and has done subsequently for at least one Section 213(a)(1) regulation (*see* discussion below)—a higher standard of judicial deference is warranted.

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[9] Even if this were not the case, and Section 552.109(a) was deemed an "interpretive rule," it still should receive *Chevron* deference. This Court has not ruled out deference for interpretive rules, saying only that they "enjoy no *Chevron* deference as a class," *Mead*, 533 U.S. at 232, and an interpretative rule issued after notice and comment would seem to be at the forefront of such rules deserving *Chevron* deference.

The decision in *Auer* reflects that distinction. *See* 519 U.S. at 457-58. There, the Court upheld a regulation promulgated under Section 213(a)(1) that, like the regulation at issue here, was located in a subpart entitled "Interpretations." In his brief in *Auer*, the Solicitor General specifically called attention to that heading, observing: "Although the 'salary basis' test (29 C.F.R. 541.118) appears in the 'interpretations' subpart (Subpart B) of Part 541, rather than the 'general regulations' subpart (Subpart A), that placement does not affect the level of deference owed to the rule." Brief of the United States, No. 95-897, at 16 n.4. The brief went on to note that "Section 541.118 was promulgated pursuant to notice and comment rulemaking in accordance with the statutory authorization in Section 13(a)(1). *See* 19 Fed. Reg. 1321-1322 (1954)." *Id.* The Court accorded the regulation full *Chevron* deference. *See* 519 U.S. at 457.[10]

Apart from the Subpart B heading, the only other indicia of "non-lawmaking" cited by the Second Circuit were a declaration in Section 552.2(c) that "[t]he definitions required by section 13(a)(15) are contained in §§ 552.3, 552.4, 552.5, and 552.6," *see* Pet. App. 26a (quoting 29 C.F.R. § 552.2(c)), and statements in the preamble that "Subpart A of 29 C.F.R. Part 552 defined and delimited [the terms from Section 213(a)(15)]" and "Subpart B set out statements of general policy and interpretation concerning the application of the . . . Act to domestic service employees." 40 Fed. Reg. 7404. In the court of appeals' view, those observations indicated that

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[10] Respondent has said that *Auer* is inapposite because the regulation "was . . . entitled to heightened deference as the agency's construction of its own regulation," Br. in Opp. 15-16 n.18, but she was focusing on a different part of the *Auer* opinion. Although the Court later addressed the agency's interpretation of its own regulation, *see* 519 U.S. at 461-63; pages 40-42 *infra*, the earlier part of the *Auer* opinion considered whether the regulation itself "reflects an unreasonable interpretation *of the statutory exemption*." 519 U.S. at 457 (emphasis added). Applying *Chevron* deference, the Court held that it did not. *See* 519 U.S. at 457-58.

the Department had exercised its Section 213(a)(15) rulemaking power only with respect to matters in the enumerated sections or in Subpart A. *See* Pet App. 3a; 26a. The short answer to this point, however, is that it would make no difference here even if it were correct. Given that the Department promulgated the regulations under two separate, and individually sufficient, grants of lawmaking power—Section 213(a)(15) and Section 29(b) of the Amendments—Section 552.109(a) can be supported, and meet the standard for *Chevron* deference, under either or both. *See* pages 18-19 *supra*. The Second Circuit never even mentioned the separate delegation of authority in Section 29(b), leaving its analysis fatally incomplete.

In any event, it seems very doubtful that the Department exhausted all of its Section 213(a)(15) authority in the provisions specified in Section 552.2(c), or even in Subpart A as a whole. Section 213(a)(15) conferred the power both to "define" and to "delimit" the terms of the exemption, and the term "delimit" has a broad meaning—"to fix or determine the limits of" (*see Webster's Third New International Dictionary* at 597 (1993))—that fits closely with what the Department did in many of the Subpart B provisions. *See, e.g.*, 29 C.F.R. §§ 101(a); 101(b); 103; 104(a); 105; 106; 109(b). Indeed, Section 552.109(a) itself is, in form and effect, a "delimiting" regulation: it sets the boundaries of the "companionship services" exemption by declaring that it covers domestic service workers employed by third parties. Given that Congress wanted the Department to delimit the terms of Section 213(a)(15), and given that the Department did in fact delimit them throughout both subparts of the 1975 regulations, it seems like overparsing for the Second Circuit nevertheless to conclude that the Department was not doing what Congress had authorized it to do.

In sum, Section 552.109(a) has all the earmarks of a regulation deserving *Chevron* deference. *See Johnston v. Volun-*

teers of America, Inc., 213 F.3d 559, 562 (10th Cir. 2000) (granting *Chevron* deference to Section 552.109(a)); *Welding v. Bios Corp.*, 353 F.3d 1214, 1217 n.3 (10th Cir. 2004) (same). This Court has said that "*Chevron* itself is a good example showing when *Chevron* deference is warranted," *Mead*, 533 U.S. at 237 n.18, and, measured by that standard, Section 552.109(a) readily qualifies. The regulation not only sets out a clear unequivocal rule after notice-and-comment rulemaking, but does so in reliance on both specific and general grants of rulemaking authority, only the latter of which was given to the agency in *Chevron*. *See* 42 U.S.C. § 7601(a) (2000) (authorizing Secretary to "prescribe such regulations as are necessary to carry out his functions under this Act"). That is enough to earn the deference that *Chevron* commands.

II. THE THIRD PARTY EMPLOYER REGULATION REFLECTS A REASONABLE, INDEED PREFERABLE, READING OF THE STATUTE

A. The Statute Does Not Exclude Domestic Workers Employed By Third Parties

Under *Chevron*, a reviewing court is to decide "whether the statute unambiguously forbids the [a]gency's interpretation, and, if not, whether the interpretation, for other reasons, exceeds the bounds of the permissible." *Barnhart*, 535 U.S. at 218. If neither is the case, then the court must "accept the agency's construction of the statute, even if the agency's reading differs from what the court believes is the best statutory interpretation." *Brand X*, 545 U.S. at 980; *see Mead*, 533 U.S. at 229 (court may not reject agency's interpretation "simply because the agency's chosen resolution seems unwise"). Here, the Department has determined that companions employed by third parties fall within the scope of the Section 213(a)(15) exemption. Not only is that interpretation permissible under the statutory language, it would be the better interpretation even if the agency view was given only

the lesser deference contemplated by *Skidmore*, or no deference at all. *See generally Edelman v. Lynchburg College*, 535 U.S. 106, 114 (2002) (no need to decide level of deference when agency interpretation is clearly right).[11]

At the outset, it is important to identify the ground on which the debate about statutory language takes place. Although the challenge in this case is to an exemption for persons providing "companionship services," 29 U.S.C. § 213(a)(15), respondent is not asking the Court to adopt a limiting definition of that term, but rather a limiting definition of the term "employed in domestic service." Br. in Opp. 20-21. That latter term, however, does not just play a role in setting the boundaries of the *exemption*: it also serves to define the scope of affirmative *coverage* for all domestic workers (cooks, maids, nurses, housekeepers etc.) under the provisions added by the 1974 Amendments. *See* 29 U.S.C. §§ 206(f), 207(*l*). Respondent's attempt to narrow the exemption would, therefore, narrow the coverage of the Act as a whole. That fact not only makes it inappropriate to rely on the principle that exemptions should be narrowly construed, *see, e.g.*, *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1960),[12] but may help to explain why the Second Circuit, on

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[11] Even where *Chevron* does not apply, this Court has observed that "an agency's interpretation may merit some deference whatever its form, given the 'specialized experience and broader investigations and information' available to the agency . . . , and given the value of uniformity in its administrative and judicial understandings of what a national law requires . . . ." *Mead*, 533 U.S. at 234 (quoting *Skidmore*, 323 U.S. at 139, 140) (internal citations omitted). The Court in *Mead* suggested that, in that context, reasonable agency views are entitled to "'at least some added persuasive force,'" *id.* at 235 (quoting *Metropolitan Stevedore Co. v. Rambo*, 521 U.S. 121, 136 (1997)), or "'some weight,'" *id.* at 235 (quoting *Martin v. Occupational Safety and Health Review Comm'n*, 499 U.S. 144, 157 (1991)), or a "respect proportional to [their] 'power to persuade.'" *Id.* at 235 (quoting *Skidmore*, 323 U.S. at 140).

[12] Although the Second Circuit relied on that principle, Pet. App. 10a, it is inapposite where the mechanism for narrowing the exemption would be a

remand, retreated from its earlier suggestion that the statute itself cast doubt on the validity of the third party employer regulation. *See* Pet. App. 5a ("[c]onsideration of congressional intent therefore does not lead to any definitive conclusion regarding the enforceability of § 552.109(a)").

To be sure, Congress did not announce in unequivocal terms that it intended the 1974 Amendments—the two coverage provisions for domestic employees generally, 29 U.S.C. §§ 206(f), 207(*l*), and the exemption provision for domestic employees providing companionship services, 29 U.S.C. § 213(a)(15)—to cover domestic workers employed by third parties. But the coverage provisions are written in sufficiently broad terms that they can extend to such employees, and they certainly do not "unambiguously forbid[]" that reading. *See Barnhart*, 535 U.S. at 218; *see also id.* (court must sustain permissible agency interpretation "[i]f . . . the statute is silent or ambiguous with respect to the specific issue") (internal quotation marks omitted); *Yellow Transp.*, 537 U.S. at 45 (same). Section 206(f), for example, directs that the minimum wage must be paid to "*[a]ny employee*—(1) who in any workweek is employed in domestic service in a household [if the employee's cash compensation constituted wages under Title II of the Social Security Act] or (2) who in any workweek—(A) is employed in domestic service in one or more households; and (B) is so employed for more than 8 hours in the aggregate." 29 U.S.C. § 206(f) (emphasis added). That language does not say that the homeowner must be the direct employer, and the explicit reference to employees "employed . . . in one *or more* households," *see* 29 U.S.C. § 206(f) (emphasis added), naturally reaches domestic service workers employed by third parties like employment agencies, who frequently work in several different houses. There is

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limitation on the overall coverage of the Act. A limitation on coverage would run counter to the principle that a remedial act should be construed broadly. *See Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967).

also no obvious limitation to homeowner-employed employees in the language of the overtime subsection, 29 U.S.C. § 207(*l*), which declares that "[n]o employer shall employ any employee in domestic service in one or more households for a workweek longer than forty hours [without paying overtime]." *Id.* (emphasis added). Indeed, because the overtime provision contemplates a single employer for a worker in "one *or more* households," it quite strongly suggests that the section would apply to third party employers, which would be more likely than an individual homeowner to employ someone to work in more than one household.

The terms of the exemption provision, likewise, contain no identifiable exclusion for employees of third parties. The focus of the provision is not on the nature of employer, but on the type of work that the exempted employees perform: "companionship services for individuals who (because of age or infirmity) are unable to care for themselves." 29 U.S.C. § 213(a)(15). And, once again, there is nothing in Section 213(a)(15) to show that Congress intended the availability of the exemption to turn on who employed the worker: the language describing the workers subject to the exemption—"any employee employed in domestic service employment"—appears, on its face, to be broad and inclusive.

Respondent's argument for excluding workers employed by third parties ultimately rests upon a single premise: that the term "employed in domestic service," given its "ordinary meaning" (Br. in Opp. 21), refers only to workers "employed in a household *by the household.*" Br. in Opp. 21 (emphasis added). But the language of the Amendments provides little support for this reading. While Section 213(a)(15) itself sheds no real light on the question, Section 206(f), which is headed by the similar term "Employees in domestic service," provides that the minimum wage requirement will apply to workers "employed in domestic service *in a household*," 29 U.S.C. § 206(f)(1) (emphasis added), not workers "employed

in domestic service in a household *by the household*." *See also* 29 U.S.C. § 206(f)(2)(A) ("in one or more households"). The same is true for the overtime provision. *See* 29 U.S.C. § 207(*l*) ("in one or more households"). Thus, while even respondent seems to acknowledge that the phrase "in a household" most likely describes the place of work, and the phrase "by a household" would be needed to specify a particular employer, the two critical coverage provisions in the Amendments use only the former phrase, not the latter.

Largely bypassing the statutory language, respondent focuses instead on selected parts of the legislative history, Br. in Opp. 21, particularly a sentence in various House and Senate Reports saying that "[t]he generally accepted meaning of domestic service relates to services of a household nature performed by an employee in or about a private home of the person *by whom he or she is employed*." *See* S. Rep. No. 93-690, 93rd Cong., 2d Sess. 20 (1974) (emphasis added); S. Rep. No. 93-300, 93rd Cong., 1st Sess. 22 (1973); H.R. Rep. No. 93-913, 93rd Cong., 2d Sess. 35 (1974).[13] But, even leaving aside the fact that the italicized language does not appear in the statute—unlike other statutes that do contain such language, *see, e.g.*, 26 U.S.C. §§ 3121(a)(7)(A), (B) ("domestic service in the private home of an employer")—there are good reasons to doubt that it signals a congressional intent to cover only domestic workers employed by individual homeowners. The first is that, despite this supposed "generally accepted meaning," the same congressional reports treat the phrase "domestic service employees" as more or less synonymous with the phrase "private household workers," *see* S. Rep. No. 93-690, at 19; S. Rep. No. 93-300, at 21-22; H.R. Rep. No. 93-913, at 33; *see also* H.R. Rep. No. 93-232, 93rd Cong, 1st Sess. 31 (1973), a term that, as defined by the

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[13] The same language is contained in Section 552.3, the agency regulation defining "domestic service employment." 29 C.F.R. § 552.3. We discuss that regulation at pages 39-42 *infra*.

Department in reports submitted to Congress, unquestionably included domestic workers employed by persons *other than* the homeowner. *See* Department of Labor 1973 Report to Congress on Minimum Wage and Maximum Hours Under the Fair Labor Standards Act at 27; Department of Labor 1974 Report to Congress on Minimum Wage and Maximum Hours Under the Fair Labor Standards Act at 31-32; *see also* 119 Cong. Rec. 24,796 (statement of Sen. Dominick) (quoting the Department's definition of "private household workers" in discussing the proposal to cover domestic workers).[14] This off-hand equating of the terms suggests that members of Congress, in using them, were not thinking about the nature of the employer, but rather about the nature and location of the services to be performed (a point on which the terms are in agreement). That suggestion is reinforced by the fact that, in every instance, the discussion immediately following the "generally accepted meaning" reference is about the *place* ("in or about a private home" not a "boarding or lodging house") where domestic work is done. *See* S. Rep. 93-690, at 20; S. Rep. No. 93-300, at 22; H.R. Rep. No. 93-913, at 35.

In addition, a reading that limits the 1974 Amendments to homeowner-employed workers would leave a number of unexplained gaps in coverage, an outcome that would be hard to square with statements that, subject to the prescribed exemptions, the Amendments were meant "to include within the coverage of the Act all employees whose vocation is domestic service." S. Rep. No. 93-690, at 20; H.R. Conf. Rep. No. 93-413, 93rd Cong., 1st Sess. 27 (1973); H.R. Rep. No. 93-913, at 36. *See also* S. Rep. No. 93-690, at 18 ("all employ-

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[14] The term was defined by the Department as: "[A]nyone aged 14 and over working for wages, including pay-in-kind, in or about a private residence who was employed by (1) a member of the household occupying that residence or (2) a household service business whose services had been requested by a member of the household occupying that residence." *See* 1973 Report, at 27; 1974 Report, at 31-32.

ees in private household domestic service"); S. Rep. No. 93-300, at 20 (same). Apart from Sections 206(f) and 207(*l*), the only basis for coverage of domestic service workers in the Fair Labor Standards Act would be their employment by an "enterprise engaged in commerce or in the production of goods for commerce." *See* 29 U.S.C. §§ 206(a)(1); 207(a)(1); *see generally National League of Cities,* 426 U.S. at 837-38; *Tony and Susan Alamo Foundation,* 471 U.S. at 295 n.8. That provision is inapplicable, however, if the employer has annual gross sales that are less than the statutorily defined amount: $250,000 in 1974 (now $500,000). *See* 29 U.S.C. § 203(s)(1) (1976); 29 U.S.C. § 203(s)(1)(A)(ii). As a result, if Sections 206(f) and 207(*l*) were to apply only to homeowner-employed domestic workers, any domestic worker employed by agencies too small to qualify as an "enterprise" would fall entirely outside the Act's minimum wage and overtime protections, despite the fact that the worker was performing exactly the same kind of work (domestic service) in exactly the same place (a private home) as other domestic workers.

Taken literally, the "home of the person by whom he or she is employed" language would also exclude from the wage and hour provisions any domestic worker employed by a family member to help out another family member in the latter's home. This, too, would be an implausible omission. For example, it would make the coverage provisions of the Act inapplicable to a domestic worker who was employed by a parent to work in the house of a child, or who was employed by a child to assist in the home of an elderly parent. It is difficult to imagine that Congress deliberately wanted to make that kind of distinction, in a situation that could arise with some frequency, based on nothing more than the arbitrary fact that the homeowner directly employed the worker in one case, but not in the other.

We thus believe that the provisions of the Act—both the coverage provisions and the exemption—are best read to apply to domestic service workers employed by third parties, as well as to workers employed by the homeowner. This straightforward reading not only fits with the statutory text and the goal of raising wages for domestic workers generally, but it advances one evident purpose of the exemption: keeping the cost of "companionship services" within reach for those who need them. During debates on an earlier bill covering domestic service employees—a bill that did not contain an express exemption for "companionship services"—one opponent of coverage expressed concern that the higher costs resulting from the minimum wage and overtime provisions might force elderly people out of their homes and into institutions. *See* 118 Cong. Rec. 24,715 (1972) (statement of Sen. Taft). Later, again discussing a bill without an express exemption for "companionship services," various Senators suggested that, if forced to pay minimum wage and overtime, working people would find it difficult to afford needed companionship services for elderly relatives. *See* 119 Cong. Rec. 24,797 (statement of Sen. Dominick) (referring to letter from Hilda Poppell); *id.* at 24,797 (statement of Sen. Johnston); *id.* at 24,798 (statement of Sen. Burdick); *See also* Op. Lt. WH-368, 1975 WL 40991 (DOL Nov. 25, 1975) (noting legislative concern). It thus seems likely that, as the district court below concluded, Congress chose to include the exemption "to allow those in need of [companionship] services to be able to find such assistance at a price they can afford." Pet. App. 46a; *see also Welding*, 353 F.3d at 1217 ("Congress created the 'companionship services' exemption to enable guardians of the elderly and disabled to financially afford to have their wards cared for in their own private homes as opposed to institutionalizing them"). This concern about affordable companionship services, however, does not come and go depending upon whether the workers are employed directly by the homeowner or by a third party. *See* Pet. App.

46a-47a. Indeed, the need to restrain costs in the case of third party employees has only become more acute as agencies provide an increasing amount of the needed care.

Given the importance of preserving affordable services, there is nothing untoward about the possibility that the exemption would apply to companions who, prior to 1974, had been covered workers under the enterprise provision. Although the Second Circuit initially seemed troubled by that idea, *see* Pet. App. 29a-30a, the court of appeals offered no basis for thinking that Congress had ever directly addressed the issue of minimum wage and overtime for companions until it took up the subject of providing coverage for domestic employees as a class. When Congress did consider the issue, however, it ultimately concluded, apparently for the reasons just discussed, that it was appropriate to exempt workers providing companionship services from the wage and hour provisions, leaving their compensation to be set in light of local conditions. That more particularized judgment rightly takes precedence over the more general policies reflected in other parts of the Act, *see generally National Cable and Tel. Ass'n, Inc. v. Gulf Power Co.*, 534 U.S. 327, 335 (2002), and Section 552.109(a) is consistent with that judgment.

B. The Department's Regulations Do Not Bar The Exemption For Third Party Employees

The Second Circuit paid little attention to the language of the Act, instead resting most of its decision to invalidate the exemption for employees of third parties on its belief that the exemption was incompatible with the Department's own regulatory definition of "domestic service employment" in Section 552.3. *See* Pet. App. 30a (emphasizing the "home of the person by whom he or she is employed" language). The Department, however, has explained at length why this reading of its regulations is incorrect. *See* Pet. App. 54a-63a. In its December 2005 Advisory Memorandum, the Department

said that neither Section 552.3 nor Section 552.101(a)—a second regulation containing similar language—was intended to address the question of who employed the employee. *See* Pet. App. 55a-57a, 62a-63a. Rather, the purpose of those sections was only to specify what kind of work fell within the scope of coverage and where the work was to be performed: that is, domestic services in a private home (as opposed to, say, a boarding house). *See* Pet. App. 58a. The Department also carefully reviewed the origin of the Section 552.3 language that concerned the Second Circuit (Pet. App. 57a-59a)—as well as the discussion in Section 552.101(a) that equates the Section 552.3 definition with the term "private household workers" (*see* pages 35-36 *supra*)—stressing that its use was not meant to exclude third party employees from the category of workers covered by the domestic service provisions of the Act. *See* Pet. App. 63a.

The Second Circuit, however, declined to give deference to the Department's reading of its own regulations, *see* Pet. App. 5a, showing again an improper disregard for agency views. This Court has long recognized that an agency's interpretation of its regulations "must be given 'controlling weight unless it is plainly erroneous or inconsistent with the regulation.'" *Stinson v. United States*, 508 U.S. 36, 45 (1993) (quoting *Bowles v. Seminole Rock and Sand Co.*, 325 U.S. 410, 414 (1945)). *See also Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359 (1989); *Auer*, 519 U.S. at 461-63. As the Court has stated, the role of the judiciary is "not to decide which among several competing interpretations best serves the regulatory purpose." *Thomas Jefferson Univ.*, 512 U.S. at 512. Rather, a court must abide by any reasonable agency reading. *See id.; United States v. Cleveland Indians Baseball Co.*, 532 U.S. 200, 219 (2001).

To justify its lack of deference, the Second Circuit invoked the principle that a court "need not defer to an agency's interpretations of its own regulations when those regulations,

like § 552.109(a) and § 552.3, are unambiguous . . . ." Pet. App. 5a (citing *Christensen,* 529 U.S. at 588). But the court of appeals' assertion that the regulations are "unambiguous" is severely undercut by its further assertion that the same regulations are "jarringly inconsistent," Pet. App. 30a, a characterization that the court of appeals seemingly arrived at without making any proper effort to read them harmoniously. *See Jay v. Boyd,* 351 U.S. 345, 360 (1956) ("[w]e must read the body of regulations . . . so as to give effect, if possible, to all of its provisions"). Rather than construing the regulations together, the court of appeals chose instead to read Section 552.3 by itself and then, having ascertained its "unambiguous" meaning, decided that Section 552.3 prohibited the exemption granted by Section 552.109(a). As a result, the Second Circuit wound up attributing to the Department the highly improbable intention of, on the one hand, declaring in Section 552.3 that third party employees were ineligible for the "companionship services" exemption (by saying that they were not engaged in "domestic service employment") and then, on the other hand, simultaneously announcing in Section 552.109(a) that they were exempt anyway. Any reading that leads to such a bizarre outcome is itself proof that the regulations require a more coherent construction.

The Department has now provided a reasonable way to read the body of regulations as a whole, treating Section 552.109(a), but not Sections 552.3 and 552.101(a), as addressing the identity of the employer. *See* Pet. App. 62a-63a. By way of contrast, the reading offered by the Second Circuit and respondent puts the regulations into hopeless conflict, a state of affairs that the court of appeals could resolve only by invalidating one or the other. We actually think that, were the issue properly one for the courts to decide in the first instance, it would be more consistent with the Act to invalidate any parts of Sections 552.3 and 552.101(a) that might restrict the term "employed in domestic service" to workers employed by the homeowner, than it would be to invalidate

Section 552.109(a) in its entirely. *See* pages 32-39 *supra*. But, in any case, the issue is not one for the courts to decide in the first instance: the Department has given its own reasonable construction and, under traditional principles of deference, that is enough. *See Stinson*, 508 U.S. at 45; *Martin*, 499 U.S. at 150-51.[15]

In sum, we believe that, under any standard of deference—or without any deference at all—the Act is properly read, *first*, to cover all employees, including third party employees, that provide domestic services and, *second*, to exempt the subcategory of those employees that provide companionship services. If the *Chevron* standard is applied, as it should be, the validity of Section 552.109(a) is clearer still: nothing in the Act "unambiguously forecloses the agency's interpretation," *Brand X*, 545 U.S. at 983, and that interpretation, taken on its own terms, is entirely reasonable. The Second Circuit was wrong to strike it down.

III. POLICY ARGUMENTS AGAINST THE THIRD PARTY EMPLOYER EXEMPTION SHOULD BE DIRECTED TO THE DEPARTMENT OR TO CONGRESS

Congress has had many opportunities to eliminate the exemption provided by Section 552.109(a), but it has not done so. This lack of activity by Congress stands in marked contrast to its treatment of other exemptions granted under

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[15] The Department did not forfeit its right to deference simply because it has proposed limiting the exemption. *See Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 845 (1986); *cf.* Pet. App. 30a-31a; 5a. As the Court noted in *Schor*, "it would be antithetical to the purposes of the notice and comment provisions of the Administrative Procedure Act, 5 U.S.C. § 553, to tax an agency with 'inconsistency' whenever it circulates a proposal that it has not firmly decided to put into effect and that it subsequently reconsiders in response to public comment." *Id.* Indeed, deference to an agency interpretation is often required even when a *court* has given the statute an "inconsistent" interpretation. *See Brand X*, 545 U.S. at 982-86.

Section 213, nearly a dozen of which have been repealed over the years. *See* 29 U.S.C. §§ 213(a)(2), (4), (9), (11), (13) and (14); 213(b)(4), (7), (8), (22) and (23).

The Department likewise has left the third party employer exemption unchanged. Ever since promulgation of the regulation in 1975, the operative rule has been that employers of workers providing companionship services are not required to pay the minimum wage or time-and-a-half for overtime, regardless of whether the employer is the homeowner or a third party such as a family member or an independent agency. Indeed, the exemption for employees of third parties has become so firmly established that, when the Department recently proposed eliminating it, it decided to pull back because of concerns about the potential adverse economic effects. *See* 67 Fed. Reg. 16,668 (2002). Thus, in its final notice, after referring to its former belief that "there would be little economic impact on affected entities if such workers were not exempt from FLSA's minimum wage and overtime pay requirements," *id.*, the Department stated that "numerous commenters on the proposed rule, including multiple government agencies such as the Small Business Administration and the Department of Health and Human Services, seriously called into question the Department's conclusion that there would be little economic impact." *Id.*[16]

The potential adverse effects remain serious today. By all accounts, third-party employers, if made subject to the wage and hour laws, simply cannot absorb the increased costs directly, especially the burden of time-and-a-half overtime obligations. Unless providers can pass on the costs, therefore, their clients will face a sharp drop in the continuity and

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[16] While respondent has recently cited material from the notice of that proposed rulemaking saying that elimination of Section 552.109(a) would not be particularly costly, Br. in Opp. 7, she nowhere acknowledged that the Department revised its opinion after reviewing numerous critical comments, including those from other federal agencies.

stability of their care, with more caregivers being required in order to provide the same or fewer services. Given the highly personal nature of companionship services, "clients often are very unwilling to enter into such a relationship with more than one or two such individuals." Pet. App. 100a (Declaration of Susan Choi-Hausman). Moreover, a shifting array of personal caregivers "assaults the dignity of patients, undermines the quality of care that they receive, and is therefore detrimental to their well being." Pet. App. 86a (Declaration of Maryann Osborne). This problem is likely to get worse as the number of elderly needing care continues to grow.[17]

Respondent disputes the idea that the financial burden might fall on employers, saying that they can just shift the costs to someone else. *See* Br. in Opp. 6 (home care "heavily subsidized by federal and state governments under Medicaid and other programs"). But even if prompt reimbursement of higher costs were available—which it is not, *see* National Ass'n for Home Care & Hospice, Inc. Am. Br. in Support of Petition 7-9; New York State Assoc. of Health Care Providers Am. Br. in Support of Petition 4—it is too simple just to envision government treasuries as an inexhaustible source of funds. Funding for companionship services necessarily must compete with funding for other worthwhile causes, and legislative bodies can be expected to resist any sudden sharp increases in cost. Indeed, the United States already has expressed its concern about the adverse effect of the initial Second Circuit decision on federal payments under Medicare and Medicaid. *See* U.S. Br. No. 04-1315, at 16.

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[17] Trying to minimize the potential effect of overtime payments in one State, respondent says that New York Medicaid regulations limit personal care services to 28 hours a week "absent unusual circumstances." Br. in Opp. 8. But those "unusual circumstances" are, in fact, quite usual, including situations in which "assistance by informal caregivers is unavailable, withdrawn, reduced, or unacceptable to the patient." 18 NYCRR Section 505.14(a)(6)(ii)(1)(iii). In such cases, patients can, and often do, receive up to continuous round-the-clock care.

Respondent also advances various policy arguments, saying, for example, that higher wages will induce more workers to provide companionship services. *See* Br. in Opp. 8-9. But, if those arguments have force, the Department is free to engage in new rulemaking proceedings to consider them. And Congress, of course, may always review the current need for the exemption, an inquiry that would allow Congress at the same time to address the potential financial impact on Medicare and Medicaid if the exemption were eliminated. With their greater perspective, those branches are ultimately better situated than the federal courts to make any changes that are needed.

CONCLUSION

The judgment of the United States Court of Appeals for the Second Circuit should be reversed.

Respectfully submitted,

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